Supreme Court, U.S.
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No. 99-1370

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF YONKERS, NEW YORK

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QUESTIONS PRESENTED

1. Whether the State of New York's petition improperly raises issues not addressed and resolved in the Second Circuit's most recent 1999 decision in this case, but that instead relate to issues addressed and resolved in the Second Circuit's earlier 1996 decision in this case, as to which certiorari review has been denied.

2. Whether in 1996 the Second Circuit correctly found the State defendants liable for contributing to segregation, applying well-established precedent to the amply supported factual findings in this case.

3. Whether the Second Circuit's 1996 holding that State liability is appropriate under the Equal Educational Opportunities Act is fully consistent with the decisions of this Court and the Courts of Appeals.

4. Whether the district court's apportionment of liability to fund a desegregation remedy between the State of New York and the City of Yonkers was well within the scope of its equitable remedial discretion.

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BRIEF IN OPPOSITION FOR RESPONDENT CITY OF YONKERS, *NEW YORK*

Respondent City of Yonkers, New York ("the City") respectfully asks this Court to deny the State of New York's petition for writ of certiorari filed in this cause on February 14, 2000. For the most part, the State's current certiorari petition is nothing more than a second attempt to seek certiorari review of issues that were resolved by the Second Circuit's 1996 decision in this case. In its 1996 opinion, the United States Court of Appeals for the Second Circuit properly concluded, given strong factual findings in the district court, that the State of New York and its officials were liable for school segregation in the City of Yonkers where the State petitioners: (1) knew of de jure school segregation in Yonkers, New York; and (2) "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *United States v. City of Yonkers*, 96 F.3d 600, 618-19 (2d Cir. 1996) (Pet. App. at 109a). In 1997, the State filed a petition for writ of certiorari, challenging the Second Circuit's 1996 determination of State liability. This Court denied the State's 1997 certiorari petition on June 23, 1997. *New York v. Yonkers Board of Education*, 521 U.S. 1104 (1997).

The State now raises two of the very same issues previously raised in its 1997 certiorari petition under the pretext of seeking review of the Second Circuit's latest 1999 decision in this case. In its current certiorari petition, the State seeks review of only one issue addressed by the Second Circuit in its 1999 decision — the apportionment of liability for school desegregation. The remainder of the issues raised in the State's petition relate to issues resolved in the 1996 Second Circuit opinion — issues that were neither addressed nor revisited in the Second Circuit's most recent decision. The district court's apportionment of liability, affirmed by the Second Circuit, was well within the

equitable discretion of the district court and is amply supported by the factual record in this case. The Second Circuit's 1999 decision does not warrant this Court's review.

STATEMENT OF JURISDICTION

In their petition for writ of certiorari, the State petitioners challenge the Second Circuit's opinion and judgment entered on November 16, 1999, invoking the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Two of the three points raised in their petition, however, relate not to issues addressed and resolved in the Second Circuit's 1999 decision, but rather relate to issues addressed and resolved in the Second Circuit's earlier 1996 decision in this case. In 1997, the State sought certiorari review of that decision, and its petition was denied. *New York v. Yonkers Bd. of Educ.*, 521 U.S. 1104 (1997). Points I and III of the current petition (which relate to the 1996 decision) accordingly are not properly asserted in a petition asking this Court to review the Second Circuit's 1999 decision. This Court has jurisdiction to review the Second Circuit's 1999 decision pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Initial Proceedings in the District Court.

In 1985, the United States District Court for the Southern District of New York found that the Yonkers Public Schools were unconstitutionally segregated. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (1985) ("*Yonkers I*").[1] The district court found the City of Yonkers liable for discrimination in housing and education, found the Yonkers Board of Education ("Board") liable for school segregation and, in 1986, entered appropriate remedial orders. *See id.*; *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986) (School Desegregation Order) ("*Yonkers II*") and 635 F. Supp. 1577

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1. The City adopts the Second Circuit's short titles for the many decisions in this longstanding litigation.

(S.D.N.Y. 1986) (Housing Remedy Order). The Second Circuit affirmed these decisions, and this Court denied review. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) ("*Yonkers III*"), *cert. denied*, 486 U.S. 1055 (1988).

In 1987, the NAACP moved to add the State of New York, certain State officials, and the New York State Urban Development Corporation ("UDC") as parties defendant. Pet. App. at 301a-313a. The Board similarly sought leave to file a cross-claim against these added State defendants. Pet. App. at 284a-300a. The NAACP and the Board alleged that the State defendants should be compelled to participate in the existing school and housing remedies and to assist in eliminating the vestiges of school segregation, because the State defendants had known of the de jure segregation in Yonkers and had the authority and duty to eliminate segregation, but had, through action and inaction, contributed to school and housing segregation in response to race-related political pressures. *See* Pet. App. at 284a-313a. Although denying that there were additional vestiges of segregation in the Yonkers Public Schools for which the City should be held responsible, the City supported the NAACP's and the Board's claims that the State defendants were liable for segregated conditions in Yonkers. *See* Pet. App. at 128a.

After some procedural delay and several interlocutory, immunity-based appeals by the State defendants, the district court severed the issues raised in the 1987 complaint and cross-claim for trials on the issues of: (1) whether unaddressed vestiges of unlawful segregation continue in the Yonkers Public Schools; (2) whether the State defendants are liable; and (3) what remedies are appropriate. After hearing evidence related to the vestiges issue, the district court determined that the Board had "achieved desegregation of enrollments among the schools," but that vestiges of segregation remained to be remedied. *See United States*

v. City of Yonkers, 833 F. Supp. 214, 216 (S.D.N.Y. 1993) ("*Yonkers IV*").[2]

In the spring of 1994, the district court held a six-week trial on the issue of whether the State defendants should be held liable for the segregated conditions found by the Court in its 1985 liability decision as well as for the vestiges of segregation in the Yonkers Public Schools. As the Second Circuit noted, "the [district] court received thousands of exhibits and received testimony from more than 30 witnesses, including members and former members of the New York Board of Regents, a former Commissioner, a former Deputy Commissioner, key officials from the State Education Department" and "City officials and community leaders who had interacted with [the State defendants] on school and housing matters." Pet. App. at 73a. The district court issued two liability opinions. The first included the bulk of its factual findings and addressed the claims against the State defendants under the Equal Protection Clause and 42 U.S.C. § 1983. *See United States v. City of Yonkers*, 880 F. Supp. 212 (S.D.N.Y. 1995) ("*Yonkers V*") (Pet. App. at 123a-184a). The second addressed the claims against the State defendants under Title VI and the Equal Educational Opportunity Act ("EEOA"). *See United States v. City of Yonkers*, 888 F. Supp. 591 (S.D.N.Y. 1995) ("*Yonkers VI*") (Pet. App. at 185a-204a).

B. The District Court's 1995 Opinions.

In its first State liability opinion, the district court made extensive factual findings based upon the evidence it had heard and received during the 1994 State liability trial. In both their 1997 and 1999 certiorari petitions, the State defendants largely have ignored these findings because, as the Second Circuit noted, these findings were "largely favorable to plaintiffs."

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2. At the time of the 1996 appeal, the district court's vestiges decision had not yet been embodied in a final judgment and, therefore, was not before the Second Circuit on appeal. Pet. App. at 72a. On remand in 1997, the district court addressed the vestige issues and remedial issues as explained herein.

See Pet. App. at 73a. Indeed, the State defendants challenged only one of these factual findings in their 1996 appeal. *See* Pet. App. at 99a.

In 1995, the district court found that the State defendants "knew of the segregation in Yonkers, had actual or constructive knowledge that this segregation was de jure, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *See* Pet. App. at 96a-97a. In 1996, the Second Circuit affirmed these factual findings and summarized them, as follows:

> In detail, the district court found, *inter alia,* that
>
> > — the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"
>
> *Yonkers V*, 880 F. Supp. at 219, 220;
>
> > — the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"
>
> *id.* at 220;
>
> > — the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"
>
> *id.* at 245;
>
> > — the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily,"

id. at 219, 220. The court also found, *inter alia*,

> — that in other communities, Commissioner Nyquist had "not hesitate[d] to enforce the [New York] racial integration policy,"

id. at 225;

> — that the legislature responded to Nyquist's desegregation efforts with a statute that "prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions,"

id.;

> — that, after that statute was declared unconstitutional, the legislature took other actions whose "purpose and intended effect" were "similar" and "had the cumulative effect of undermining efforts to reduce school segregation,"

id.;

> — that the legislature also adopted "a new practice" of having candidates for the Board of Regents be "interviewed prior to appointment by legislators . . . who were known to be hostile to vigorous desegregation efforts,"

id.;

> — that the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force,"

id.;

> — that this revision was a response to "criticism of Commissioner Nyquist's vigorous desegregation efforts,"

id.;

> — that the Board of Regents lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders in an effort to "rein in Nyquist's desegregation efforts,"

id. at 226; and

> — that the Board of Regents finally simply fired Nyquist; "[h]is views on [integration] were a substantial factor leading to his discharge,"

id.

United States v. City of Yonkers, 96 F.3d at 614 (Pet. App. at 97a-99a) (omissions and alterations in original).[3]

Notwithstanding these strong factual findings, the district court stated that it was "constrained" to find that the State defendants were not liable under the district court's interpretation of the Second Circuit's opinion in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). Pet. App. at 183a. In essence, the district court believed that proof of specific approval and support of local authorities' unlawful conduct, and not mere knowing inaction or action, was necessary to impose liability upon the State defendants under *Arthur*. *See* Pet. App. at 163a-164a. The district court explained, however, that it reached this conclusion "with

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3. In their Statement of the Case, the State petitioners present factual arguments regarding alleged efforts of the State with regard to desegregation. Pet. at 7-8. These "facts" were not found by the district court and are, indeed, directly contrary to the actual findings of the district court described above, as affirmed by the Second Circuit. State petitioners improperly raise these factual arguments here.

reluctance," because it found "entirely unpersuasive" the State defendants' arguments that they lacked full knowledge of the nature, cause and extent of segregation in the Yonkers Public Schools, and that they "lacked the power to address adequately the problem of school segregation." Pet. App. at 183a.

In its second liability opinion, the district court addressed issues concerning State liability under Title VI and the EEOA. Based largely upon its interpretation of *Arthur v. Nyquist*, the district court similarly held that the State defendants were not liable for school segregation under these statutes. *See* Pet. App. at 187a-204a.

C. The Second Circuit's 1996 Decision.

In 1996, the Second Circuit determined that the district court's 1995 findings of fact were supported by the evidence; concluded that those findings distinguished the *Yonkers* case from the *Arthur* decision and warranted the imposition of State liability; and vacated the district court's dismissal of the equal protection and EEOA claims against the State defendants. *United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). The Second Circuit began its analysis of the equal protection claims by restating well-established "fundamental principles governing equal protection claims" that the Second Circuit had previously set forth in its consideration of City and Board liability in the first *Yonkers* appeal. Pet. App. at 91; *see Yonkers III*, 837 F.2d at 1216-17, 1222-26. The Court of Appeals explained that a plaintiff must show that the State action complained of was motivated at least in part by a racially discriminatory purpose. *Id.* The Court then repeated its *Yonkers III* holding that "the foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." Pet. App. at 93a (quoting *Yonkers III* , 837 F.2d at 1227 (other internal quotation marks omitted)).

After thoroughly reviewing the evidence before the district court, the Second Circuit concluded that "the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was de jure." Pet. App. at 102a. The Court of Appeals explained that these "amply supported factual findings" distinguished the case from *Arthur v. Nyquist*, because in *Arthur* there had been insufficient evidence to show that the State officials had abdicated their duty to attempt to achieve desegregation. *United States v. Yonkers*, 96 F.3d at 617 (Pet. App. at 105a-106a). The Second Circuit accordingly concluded that the State defendants' knowledge of Yonkers segregation, their failure to exercise their authority and responsibility to achieve desegregation in Yonkers, and their actions and omissions taken in reaction to "racially inspired positions of the local officials and the known anti-desegregation stance of other state officials" were a sufficient basis for liability under § 1983 for prospective injunctive relief to remedy vestiges of school segregation in Yonkers. *Id.* at 618-19 (Pet. App. at 106a-109a).

The Court of Appeals similarly held that the State defendants were liable under the EEOA. The Court reasoned that the EEOA imposed "on States the obligation to enforce the equal-educational-opportunity obligations of local educational agencies," and provided protections similar to those provided by the Equal Protection Clause. *Id.* at 620 (Pet. App. at 112a-116a). Because it had found the State defendants liable under Section 1983 and the EEOA, the Court of Appeals declined to address the plaintiffs' Title VI claims. *See id.* at 621. (Pet. App. at 116a).

The Second Circuit vacated the judgment of the district court, which had dismissed the claims against the State defendants, and remanded the case for further proceedings. *Id.* at 623 (Pet. App. at 120a). The Second Circuit denied the State's request for en banc consideration. Pet. App. at 121a-122a.

The State then petitioned this Court for a writ of certiorari. That 1997 certiorari petition raised two of the very same issues raised in the 2000 certiorari petition currently before the Court. The Court denied the 1997 petition on June 23, 1997. *New York v. Yonkers Bd. of Educ.*, 521 U.S. 1104 (1997).

D. 1997 Proceedings in the District Court.

1. The District Court's Vestiges/EIP II Order.

Having determined in its 1993 interlocutory opinion that unremedied vestiges of segregation remained in the Yonkers Public Schools, *see* Pet. App. 205a-246a, and having received the mandate finding the State defendant officials liable for school desegregation, the district court proceeded to a hearing on the remedy for the vestiges in September 1997.,

In an opinion and order released on October 8, 1997, the district court found that the vestiges of segregation identified in its 1993 Opinion continue and "are traceable to the prior dual school system that was established and maintained in substantial part by acts or omissions of the State." Pet. App. at 42a-44a. The court also made the findings necessary to impose liability on the State under the EEOA, 20 U.S.C. § 1706. Pet. App. at 44a-48a.

The Court received into evidence and ultimately approved the Educational Improvement Plan II ("EIP II"), a further educational remedial plan prepared by the YBOE as an overall improvement plan for the YPS that would eliminate the vestiges identified by the district court in 1993. EIP II was described as "a broad framework which required additional planning on a school by school basis." Pet. App. at 59a. The court received no alternative proposals and directed that the YBOE move forward with planning for implementation of EIP II. Pet. App. 54a-65a.

The State defendants appealed the October 14, 1997 judgment. On February 2, 1998, the district court amended its prior order to make the judgment final under Rule 54(b),

Fed. R. Civ. P. The State defendants then filed an Amended Notice of Appeal.

2. The District Court's Order Apportioning Liability.

Also following the Second Circuit's finding of State liability in its 1996 decision, on May 15, 1997, the City raised by motion with the district court the issue of the State's participation in the existing EIP I remedy. City App. at 1a.[4] Given the finding of State liability, the City sought an order confirming that the "State defendants are jointly liable with the City of Yonkers to provide the necessary funding to fully implement the 1986 School Desegregation Order." City App. at 6a. The district court directed the Monitor to conduct a hearing to determine the portion of "EIP I related costs which the State Defendants should bear." Jt. App. at 591-92.[5]

Following a three-day hearing, the Court Monitor issued an Advisory Opinion which ultimately was approved and adopted by the district court. Jt. App. at 224-52. The Monitor found that certain programs could be identified that most directly furthered the EIP I remedy. Those program costs amounted to just under $50 million for the 1996-97 fiscal year. *Id.* at 233-34. However, the Monitor found that it was difficult to determine with precision the total cost of EIP I because the programs of EIP I were intertwined with all school functions of the Yonkers Public Schools. *Id.* at 235-36. The Monitor further acknowledged his prior view that "EIP I costs are not readily mutually exclusive of much of the basic costs of the District," but recognized that the need for a fully funded EIP I was overriding. *Id.* at 235.

While the State claimed it already provided funding for EIP I through general annual legislative appropriations to school

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4. That motion is included in the City's appendix to this brief.

5. This order and the Monitor's Advisory Opinion were not included in the Petitioners' Appendix. Citations to "Jt. App." are citations to the Joint Appendix filed in the Second Circuit.

districts, the Monitor found that the complexities of the State funding formula and disputes over the extent to which the State was providing incremental funds for EIP I rendered the question hopelessly complicated. Jt. App. at 236. The Monitor concluded that ongoing disputes over each party's contribution to the remedy would only serve to impair its efficient implementation. *Id.* at 236-37. The Monitor found that both the City and the State had the financial capacity to fund EIP I although "the City of Yonkers has come close to saturating its ability to cover the costs of EIP I . . . " *Id.* at 233. Under such circumstances, the Monitor found that prospectively the City and State should share the costs of EIP I and the YBOE budget equally and receive full credit for all of their ongoing contributions to education funding. *Id.* at 236.

The Monitor constructed a model for provision of additional funding due from the State for FY 96-97 (the "short-term remedy") as well as a long-term model to ensure equal provision by the City and State of funding for the YPS budget and EIP I and long term stability of the YPS to further the efficient implementation of the remedy. Jt. App. at 246-51.

The district court approved the Monitor's recommendations and adopted the Advisory Opinion. Pet. App. 33a-35a. The State defendants appealed the district court's order, dated February 10, 1998, which apportioned liability equally between the City and the State. *See id.* That appeal was consolidated with the State's appeal of the vestiges/EIP II order.

E. The Second Circuit's 1999 Decision.

On June 22, 1999, the Second Circuit issued its initial decision in the State's consolidated appeal. In that opinion, the court: (1) reversed the district court's vestiges findings and vacated the EIP II remedial order; and (2) affirmed the order apportioning liability between the State defendants and the City. *See United States v. City of Yonkers*, 181 F.3d 301 (2d Cir. 1999). The panel majority concluded that the record did not support any alternative findings of vestiges other than the two specified

by the district court, and accordingly reversed on the vestiges issue. In partial dissent, Judge Sack disagreed as to this latter point and argued that the vestiges issue should be remanded to the district court for further findings on the present record as to whether there were alternative remaining vestiges. *See* 181 F.3d at 321-30.

Granting a petition for panel rehearing, the Second Circuit panel revised its opinion to provide for such a remand, stating that it was

> convinced by Judge Sack's view, expressed in partial dissent to our initial opinion on this appeal, that it is prudent to ask the district court to make further findings on the present record and in light of this opinion as to whether — or not — there are remaining vestiges of segregation in the Yonkers School System, and if so what they are and what record evidence is relied on for support.

United States v. City of Yonkers, 197 F.3d 41 (2d Cir. 1999). In the November 1999 opinion (which is the subject of this certiorari petition), the Second Circuit: (1) vacated the district court's order containing findings of vestiges and the further EIP II remedy; and (2) again affirmed the district court's order apportioning liability between the State defendants and the City. Consistent with Judge Sack's earlier opinion, the panel then remanded as follows:

> To accomplish the remand for that purpose, we grant the petition for rehearing, vacate our prior opinion, decide the appeal by this opinion, remand for a limited purpose, and provide for automatic restoration of appellate jurisdiction without a new notice of appeal. *See United States v. Falameh*, 84 F.3d 47, 50 (2d Cir. 1996); *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994).

United States v. City of Yonkers, 197 F.3d at 46. Those vestiges issues are currently back before the district court on remand.

With regard to the district court's apportionment of liability, the Second Circuit rejected the State's capacity and standing arguments, and affirmed the district court's liability apportionment. *See id.* at 57-58. The Second Circuit explained that the "district court has broad equitable discretion to apportion remedial costs among joint tort feasors." *Milliken v. Bradley*, 433 U.S. 267, 288-91 (1977). Reviewing the record, the Second Circuit affirmed the district court's apportionment of liability, concluding that the district court had neither clearly erred nor abused its broad remedial discretion in apportioning liability and compliance costs on an equal basis between the City and the State. *Id.* at 58.

In its 1999 opinion, the Second Circuit did not revisit its 1996 conclusion that the State defendants were liable for segregation in the Yonkers Public Schools. *See United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). In fact, the Second Circuit remarked that that phase of the litigation was "not directly relevant to this [1999] appeal." *United States v. City of Yonkers*, 197 F.3d at 48.

In their current certiorari petition, the State petitioners again ask this Court to review the Second Circuit's 1996 liability determination. Those issues were resolved in 1996 and 1997 and are not properly before this Court. In its petition, the State also asks the Court to review the Second Circuit's 1999 apportionment of liability. For the reasons stated herein, that determination was well within the district court's equitable remedial discretion and does not merit certiorari review.

REASONS FOR DENYING THE WRIT

I. IN 1996, THE SECOND CIRCUIT CORRECTLY FOUND THE STATE DEFENDANTS LIABLE FOR CONTRIBUTING TO SEGREGATION, APPLYING WELL-ESTABLISHED PRECEDENT TO THE AMPLY SUPPORT FACTUAL FINDINGS IN THIS CASE.

In Point I of their current petition for writ of certiorari, the State petitioners again ask this Court to review the Second Circuit's 1996 determination that the State of New York is liable for contributing to segregation in the Yonkers Public Schools. Point I of the current certiorari petition is virtually identical to Point I of the State's 1997 certiorari petition. The Second Circuit resolved the issue of State liability in its 1996 opinion. *See United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). The State sought certiorari review; its petition was denied. The Second Circuit did not address or revisit this issue in either of its 1999 opinions. Simply put, nothing has changed the fact that the Second Circuit's 1996 determination of State liability was consistent with well-established precedent and amply supported by the district court's factual findings in this case. The Second Circuit's 1996 decision still does not merit this Court's review.

Given the district court's "amply supported factual findings," there is nothing remarkable about the Second Circuit's 1996 finding of State liability. This Court has clearly held that liability exists where the state action complained of was taken with the intent to discriminate. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). A plaintiff must establish that race was "a motivating factor," and can do so in several ways. The Second Circuit has now twice discussed in this case the circumstances under which state action or inaction taken in response to racially motivated political pressure can serve as a basis of liability. *See Yonkers III*, 837 F.2d at

1216-18, 1221-27; Pet. App. at 91a-96a. In *Yonkers III*, the Court of Appeals stated that "adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, is a factor that may be taken into account in determining whether acts were undertaken with segregative intent," *Yonkers III*, 837 F.2d at 1227 (internal quotation marks omitted), and concluded "that the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet. App. at 93a. These standards of liability are well-established and not disputed, although they are largely ignored in the State's petition. *See* Pet. at 17-21.

In its 1996 decision, the Second Circuit did nothing more than apply these precedents to the "amply supported factual findings" in this case. The Second Circuit concluded that "the record evidence amply supports the district court's finding that the State Defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was de jure." Pet. App. at 102a. The record is replete with evidence that officials of the State Education Department ("SED") had abundant contact with the Yonkers Public Schools, knew of the unremedied segregation in the schools, and reacted to state and local opposition to desegregation. *See* Pet. App. at 96a-109a. The Court of Appeals also determined in 1996 that there was "ample support" for the district court's "finding that the failure of SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of heavy pressure from the New York State legislature." Pet. App. at 102a-103a.

In their petition, the State petitioners seek to recharacterize the findings of the district court by arguing that State liability in this case was based solely on "constructive knowledge" and the State's "failure to take affirmative remedial steps." Pet. at 17-21. The State, however, ignores both the Second Circuit's and the district court's determination that State officials both acted and failed to act in response to racially motivated political pressures. The district court specifically found that the New York Legislature had passed legislation intended to undermine efforts to reduce school desegregation; that the Legislature sought to have candidates for the Board of Regents interviewed by "legislators . . . who were known to be hostile to vigorous desegregation efforts"; and that the Board of Regents fired Education Commissioner Nyquist and that "[h]is views on [integregation] were a substantial factor leading to his discharge." Pet. App. at 99a.

State liability here is not based on mere inaction. Rather, it is grounded in the trial and appellate courts' determination that State officials had full knowledge of school segregation in Yonkers and that those State officials

> failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials.

Pet. App. at 109a.

Throughout their argument, the State petitioners suggest that their actions and inaction were not causally related to the continuing segregation in the Yonkers Public Schools and that the State had "no affirmative complicity in causing such segregation." Pet. at 21. This contention is incorrect and directly contrary to the findings of the district court. In the portion of its findings entitled "The Effect on Yonkers of the State's Failure

to Intervene," the district court very carefully detailed its findings concerning the causal relationship between State action and inaction and the continuing segregation. *See* Pet. App. at 147a-149a. The district court expressly found that "there is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions," Pet. App. at 147a; that the State defendants "altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform," *id.*; and that by delaying funding for desegregation, the State "enabled opposition to the reform efforts to coalesce to a point where the [Board] became hostile to the very desegregation initiative it had originally commissioned." Pet. App. at 149a. Additionally, the district court concluded that the Board of Regents' firing of Commissioner of Education Ewald Nyquist, which the court found to be based on Nyquist's pro-desegregation positions, "bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone." Pet. App. at 148a. The State did not challenge these factual findings on appeal in 1996, *see* Pet. App. at 99a; in any event, the Second Circuit in 1996 found that the district court's factual findings were amply supported by the extensive record in this case. There can be little doubt that the district court determined — as a matter of fact — that the State's action and inaction contributed to and perpetuated school segregation in the Yonkers Public Schools.

In 1996, consistent with well-established precedent and the factual findings of the district court, the Court of Appeals correctly concluded that the State officials were liable under the Fourteenth Amendment and § 1983 for prospective injunctive relief to remedy school segregation in Yonkers for which they were responsible. This fact-intensive determination does not break new ground or merit review by this Court. The State has once before asked this Court to review the issue. The Court denied that first petition in 1997 and should likewise deny the current petition.

II. THE SECOND CIRCUIT'S 1996 HOLDING THAT STATE LIABILITY WAS APPROPRIATE UNDER THE EEOA IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

In Point III of their current petition for writ of certiorari, the State petitioners again argue that imposition of State liability under the Equal Educational Opportunities Act ("EEOA"): (a) violates the State's Eleventh Amendment immunity; and (b) misreads the language of the EEOA. Again, these arguments are identical to arguments raised in the State's 1997 petition. For the same reasons that those arguments did not merit review then, they do not merit review now.

A. The Second Circuit's holding that the EEOA expressly abrogates the State's Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA is correct and consistent with the decisions of this Court and the Courts of Appeals.

As an initial matter it is important to note that the State seeks to apply Eleventh Amendment immunity to frustrate the Second Circuit's determination that the State is liable for school segregation and should participate in a remedy. To the extent that the Second Circuit's opinion requires the State to participate in the remedial desegregation efforts in Yonkers, it merely provides prospective injunctive relief consistent with this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken*, as here, the State defendants — who were found liable for school segregation — argued that the Eleventh Amendment prevented the federal court from requiring the State to participate in the desegregation remedy. This Court flatly rejected that argument, as follows:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception

> reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, 209 U.S. 123 [(1908)], permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system.

Id. at 289 (citation omitted). The Court concluded that "such prospective relief is not barred by the Eleventh Amendment." *Id.* at 290. That is also the case here.

Even if such relief fell within the scope of Eleventh Amendment immunity, it is clear that Congress has appropriately abrogated that immunity as necessary to enforce the provisions of the EEOA. From the face of the statute, it is clear that Congress enacted the Equal Educational Opportunities Act pursuant to its authority under § 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment. *See Castaneda v. Pickard*, 648 F.2d 989, 1008 n.9 (5th Cir. 1981). This Court has explained that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citations omitted). The present statute, the EEOA, represents Congress' statutory means of enforcing the provisions of the Fourteenth Amendment as against the States in the school desegregation context.

The State of New York, however, claims that the application of the EEOA to the State in this case runs afoul of the Eleventh Amendment and of the clear-statement rule announced and explained in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and subsequent decisions of this Court. In

Atascadero, this Court held that "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 242. In subsequent decisions, this Court has further explained that congressional intent to abrogate Eleventh Amendment immunity must be both "unequivocal" and "textual." *See, e.g., Kimel v. Florida Bd. of Regents*, 145 L. Ed. 2d 522 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

The EEOA and its prohibitions are specifically and pointedly addressed to the States. Even under this Court's strict clear-statement rule, Congress' intent to abrogate Eleventh Amendment immunity as to the EEOA is both unequivocal and textual. In the decision below, the Second Circuit correctly held that the EEOA expressly abrogates "the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA," reasoning as follows:

> The EEOA (or the "Act") provides that "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 (emphasis added). Further, the Act forbids the state to perpetrate such a denial through various acts or omissions of an educational agency." *See id.* §§ 1703(a)-(f). The Act defines "educational agency" as "a local educational agency or a 'State educational agency'" *id.* § 1720(a) (emphasis added); *see also Idaho Migrant Counsel v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981) (educational agency as used in EEOA includes a "State Board of Education").

United States v. Yonkers, 96 F.3d at 619 (Pet. App. at 110a). The Second Circuit explained that the text of the EEOA explicitly provided that "[n]o state" shall engage in the prohibited conduct and expressly applied the EEOA prohibitions and remedies to "State Educational Agencies." Pet. App. at 110a-116a.

The Second Circuit's decision is consistent with the decisions of the two other Circuits that have addressed this issue. For instance, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1986), the Seventh Circuit engaged in the textual analysis required by *Atascadero* and its progeny and determined that the language of the EEOA plainly abrogated Eleventh Amendment immunity. The court reasoned that the EEOA specifically prohibited "states" from denying equal educational opportunities to individuals and imposed its restrictions and remedies directly on state educational agencies. *Id.* at 1037-38. The Ninth Circuit likewise has held that "the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies," and abrogates Eleventh Amendment immunity. *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). *See also Idaho Migrant Counsel v. Board of Education*, 647 F.2d 69 (9th Cir. 1981). To hold otherwise would mean that Congress through the EEOA intended to impose the obligations of the EEOA on the States and their agencies, but did not intend to make the States and their agencies proper parties defendant under the terms of the EEOA. Such a reading of the statute makes little sense.

Here, as in *Milliken*, the Second Circuit has found the State liable for school segregation and now requires it to participate in prospective injunctive relief to remedy any vestiges of school segregation in Yonkers. Such relief falls squarely within the prospective-compliance exception reaffirmed by *Edelman v. Jordan*, 415 U.S. 332 (1974), and *Milliken*, notwithstanding an impact upon the state treasury. The Second Circuit's decision is consistent with the decisions of this Court and with the decisions of the Courts of Appeals and does not merit review.

B. The Second Circuit's imposition of liability against the State under the EEOA is consistent with the plain language of the statute and the previous decisions of the Courts of Appeals.

As they did in their 1997 petition, the State petitioners also contend that imposition of liability against the State under the EEOA is inconsistent with the language of the statute and the Fifth Circuit's opinion in *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982). Even a cursory reading of the statute and that case shows that the State misunderstands both.

The EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by —
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . .

20 U.S.C. § 1703; Pet. App. at 356a-357a. The Second Circuit correctly held that the EEOA "provides substantive protections that 'considerabl[y] overlap . . . those provided under the Fourteenth Amendment.' " Pet. App. at 112a (quoting *United States v. School District of Ferndale, Michigan*, 577 F.2d 1339, 1346 (6th Cir. 1978)). *Accord Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981). The Second Circuit explained that the EEOA also imposes on States the obligation to enforce the equal educational opportunity obligations of its state and local educational agencies. Pet. App. at 112a. The Second Circuit's decision here is consistent with both the decision of the Sixth Circuit in *School District of Ferndale* and the decision of the Fifth Circuit in *Castaneda*. The State points to no case contrary

to this holding. Indeed, even the district court in this case explained that "it can be argued that if one were to set about to write a statute in a way that provided for vicarious State liability, one could not find language that was more clear and direct than that contained in §1703 of the EEOA." Pet. App. at 172a. The State's imaginative reading of this statute does not warrant this Court's review.

The State also seeks this Court's review based upon an imagined conflict between the Second Circuit's decision here and the Fifth Circuit's decision in *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982). The Fifth Circuit's decision in *United States v. State of Texas* was based on a truly bizarre set of facts. *See id.* at 370 ("The case is unique, and we proceed to the resolution of its appeal without great assurance or satisfaction."). In that case, the district court had based its finding of liability upon a stipulation that had been entered into by an inexperienced Assistant Attorney General who acted "without authority from her client and, in fact, in general disregard of its instructions to her." *Id.* at 368. The Fifth Circuit concluded that "a proceeding so fundamentally flawed" could not serve as a basis for liability or for the remedial orders entered by the district court. *Id.* The Fifth Circuit's decision in *United States v. State of Texas* was fact intensive and in no way conflicts with the considered legal holdings of the Second Circuit in this case, which were based on "amply supported factual findings" in the district court. The State here attempts to create a conflict where there is none.

III. THE DISTRICT COURT'S APPORTIONMENT OF LIABILITY WAS WELL WITHIN THE SCOPE OF ITS EQUITABLE REMEDIAL DISCRETION.

In Point II of their current certiorari petition, the State petitioners challenge the district court's apportionment of liability between the State and the City. Contrary to petitioners' argument, the district court's apportionment of liability is grounded in the district and appellate courts' determination of

State liability and in the district and appellate courts' determination that the State defendants/petitioners as joint tortfeasors now must participate in the EIP I remedy.

The district court's broad equitable discretion to allocate liability for a school desegregation remedy among joint tortfeasors is not in question. As the Second Circuit explained, a "district court has broad equitable discretion to apportion remedial costs among joint tort feasors." Pet. App. at 30a (citing *Milliken*, 433 U.S. at 288-91). Consistent with principles of joint and several liability, the district court's equitable remedial discretion necessarily includes the authority to allocate financial burdens among joint tort feasors to ensure that the Court's remedies are fully funded. *See Missouri v. Jenkins*, 495 U.S. 33, 53-54 (1990) (holding that the district court had not abused its discretion in requiring both the school district and the State to share desegregation costs). As the Second Circuit also stated, "in apportioning costs, courts will assess both ability to pay and relative degrees of fault, but the overriding concern is that the remedy be fully funded." Pet. App. at 30a. Here, the district court "found that the City and State were equally responsible for segregation in Yonkers, and that the sharing formula assessed a 'fair and proportionate' burden on the levels of government, given their ability to pay." Pet. App. at 31a. In affirming the district court, the Second Circuit did nothing more than apply very basic standards of review and conclude that the district court had neither clearly erred nor abused its broad remedial discretion in apportioning compliance costs. *Id.*

Nevertheless, the State argues that its responsibility for funding the EIP I remedy has somehow come to an end because issues concerning the EIP II remedy and related vestiges issues are now back before the district court on remand. In so arguing, the State confuses its established and continuing liability and responsibility (as an adjudicated joint tortfeasor) for participating in the EIP I remedy with the EIP II issues currently on remand. As explained above in the Statement of the Case, in 1985 the district court found the City and the Board liable for

school segregation and, in 1986, entered appropriate remedial orders. *See United States v. Yonkers Board of Education*, 635 F. Supp. 1538 (S.D.N.Y. 1986). Specifically, the district court directed implementation of the EIP I remedy. That remedy order remains in effect to this day. In its 1996 decision, the Second Circuit held that the State defendants were also liable for school desegregation and should participate in the remedy. *United States v. City of Yonkers*, 96 F.3d at 618-19 (Pet. App. at 109a). The district court's February 10, 1998 order merely confirms the State's responsibility for implementing the initial desegregation remedy (EIP I) and allocates liability for that remedy between the State and the City. *See* Pet. App. at 33a-35a. None of the findings that support the State's liability for the EIP I remedy has been disturbed by subsequent district court and appellate proceedings. Nothing in the Second Circuit's decision and remand concerning the EIP II order affects the State's responsibility for the initial EIP I remedy.

What the State is really asking this Court to do is to make a finding of unitariness — in the first instance — that would bring jurisdiction over this case to an end. The State has not filed in the district court a motion for a finding of unitariness — or even a motion for a finding of partial unitary status. Additionally, the vestige and further remedial issues related to the EIP II order remain pending in the district court on remand from the Second Circuit. Without first raising unitariness issues in the district court, the State asks this Court to end State participation in the original school desegregation remedy in this case. The State glibly states that "the fact that the courts have not formally entered a declaration that the Yonkers School System is unitary is immaterial." Pet. App. at 23. The State's argument in this regard is plainly contrary to this Court's decisions in *Board of Education v. Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Missouri v. Jenkins*, 515 U.S. 70 (1995), which instruct as to the appropriate means whereby a defendant may seek the withdrawal and termination of federal jurisdiction

over a school desegregation remedy. The State's latest petition for certiorari asserts no good reason why the Court should review the Second Circuit's latest decision in this case.

CONCLUSION

The Second Circuit's 1996 decision in this case was entirely consistent with the decisions of this Court and the Courts of Appeals, and was supported by the district court's clear factual findings. Similarly, the Second Circuit's 1999 decision appropriately affirmed the district court's apportionment of liability as within the district court's equitable remedial discretion. The State has for too long endeavored to avoid its responsibility to participate in the desegregative efforts of the Yonkers Public Schools. The City of Yonkers respectfully asks this Court to deny the State's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — MOTION OF CITY OF YONKERS FOR ENTRY OF ORDER REQUIRING REMEDIAL RELIEF FROM THE ADDED STATE OF NEW YORK DEFENDANTS DATED MAY 15, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

MOTION OF CITY OF YONKERS FOR ENTRY OF ORDER REQUIRING REMEDIAL RELIEF FROM THE ADDED STATE OF NEW YORK DEFENDANTS

Defendant City of Yonkers moves the Court for entry of an order requiring the added State of New York defendants to provide remedial relief to the City of Yonkers and the Yonkers Board of Education to ameliorate the segregated conditions found by this Court in its 1985 liability order, to maintain a desegregated school system and otherwise

participate in the Education Improvement Plan I Remedy Order. In support of this motion, the defendant City of Yonkers states:

1. On November 20, 1985, as part of its comprehensive liability order, this Court found that the City of Yonkers ("City") and the Yonkers Board of Education ("YBOE") had engaged in segregative practices and a dual school system existed in Yonkers. *United States v. Yonkers Board of Educ.*, 624 F.Supp. 1276 (1985 S.D.N.Y.), *affirmed*, 837 F.2d 1811 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Following further proceedings, the Court entered the School Desegregation Order ("SDO") on May 13, 1986. *United States v. Yonkers Board of Educ.*, 635 F.Supp. 1538 (S.D.N.Y. 1986), *affirmed*, 837 F.2d 1811 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). The relief required by the SDO is commonly referred to as Education Improvement Plan I or EIP I.

2. Since 1986, the City and YBOE have been required to ensure the operation of a desegregated school system that includes an extensive magnet school program, the construction of new schools, the development of additional remedial programs, transportation and many other requirements. Since the entry of the 1986 orders, the annual budget of the Yonkers Public Schools has been the subject of proceedings overseen by the Court's Monitor. During that period, the annual budget of the Yonkers Public Schools has more than doubled, requiring a very significant contribution of municipal resources to ensure compliance with the Court's orders. Moreover, during that period, the State has adjusted its school aid formulas in a manner that negatively impacts

on Yonkers. For example, in 1986, the State reimbursed most of the transportation costs; currently, the State reimburses only a small portion of transportation costs.

3. In compliance with Section J of the SDO, 635 F.Supp. 1551, the City of Yonkers has provided the funding to the Yonkers Board of Education over the past ten years to ensure the achievement and maintenance of a school system that meets the requirements of the 1986 SDO. Nevertheless, despite its best efforts to provide appropriate resources for the Yonkers Board of Education to maintain a desegregated school system, the City of Yonkers lacks sufficient levels of its own resources to meet the requirements of EIP I.

4. In the 1986 SDO, this Court retained jurisdiction to enforce the terms of its remedial orders "and for all purposes consistent with attaining the objectives of this Order." *Id.* at 1553. In ordering the implementation of EIP I, this Court directed the Yonkers Board of Education ("YBOE") to advise the Court if for any reason it was unable to implement the plan because of lack of adequate funding. *Id.* at 1551.

5. In its original 1987 pleadings directed to the added State defendants, the YBOE and NAACP sought prospective relief from the added State defendants to ensure the full and complete implementation of EIP I as well as further relief to ensure a full and complete remedy for vestiges of past segregation. The Second Amended Complaint filed by the NAACP is not limited to a claim against the State defendants for any *additional* relief provided over and above the 1986 remedy orders. The NAACP sought:

> . . . an order enjoining these added state defendants; their successors in office, agents, employees, assigns and all others acting in concert with them, to cease their unlawful acts and to assist in the implementation of plans to remedy the unconstitutional and illegal segregation in the City of Yonkers and the continued effects of unconstitutional and illegal school segregation.

Second Amended Complaint at 13 (Prayer for Relief, paragraph (c)). Similarly, the 1987 Cross-Claim of the Yonkers Board of Education provided that "the Cross-Defendants should be ordered to participate in the existing plan, and in education programs over and above those previously ordered, which are necessary to eradicate the effects of segregation found by this Court in the Yonkers Public Schools to the maximum extent practicable and as soon as possible." Cross-Claim of the Yonkers Board of Education at 21 (Prayer for Relief at (c)).

6. On September 23, 1996, the United States Second Circuit Court of Appeals entered its decision in *United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996), finding that the added State defendants had also engaged in segregative practices that created the segregated conditions found by this Court in 1985. The Court of Appeals found:

- "the defendant state officials may properly be held liable under § 1983 on plaintiffs' claims for prospective injunctive relief to remedy school segregation in Yonkers;"

- "plaintiffs were entitled to prevail against the State institutional defendants under the EEOA . . .;" and

- there is "no doubt that UDC played a role in the perpetration of school segregation in Yonkers" and the district court should "reconsider its view of the duration of UDC liability."

Hence, the Court of Appeals found that the "defendant State officials" and "institutional State defendants" are liable for segregated school conditions and, if upon reconsideration the Court finds there is no bar under the statute of limitations, the UDC may be held liable for housing and school segregation. Following a denial of the applications for rehearing by the Added State defendants, the mandate of the Second Circuit issued.

7. Having found that the State defendants engaged in a constitutional violation creating the segregated conditions in the Yonkers Public Schools, this Court has a duty to ensure that a full and complete remedy is provided. The State of New York defendants have sufficient resources to fully implement the requirements of Educational Improvement Plan I, as set forth in the 1986 SDO.

8. The City of Yonkers has previously advised the Court as well as the appropriate State officials that the City lacks the resources to fully and completely maintain the desegregated system contemplated by EIP I. See, generally, the allegations contained in the Third Party Complaint/Cross Claim, filed by the City of Yonkers on or about February 4, 1997 and the Affidavit of John D. Spencer, dated August

12, 1996, filed with the City's Notice of Motion, dated August 16, 1996. The State has opposed the City's efforts to gain additional resources.

9. The Superintendent of the Yonkers Public Schools has published a proposed budget for the YBOE for the fiscal year ending June 30, 1998 ("FY 98") requiring some $254.5 million in funds. The Superintendent has claimed that such an amount is necessary to fully fund the operations of the YPS and meet the requirements of the SDO. According to the Superintendent, without that amount of funding, the YBOE will not be able to maintain all of the programs and services contemplated by the School Desegregation Order. The currently proposed City budget for FY 98 includes an appropriation of $242 million for the YPS. That appropriation assumes that the State Legislature appropriates to Yonkers all of the amounts provided in FY 97 (including some $22 million in a "one shot" Aid to Distressed Cities appropriation in FY 97) plus $29 million in additional aid. Hence, in order to fund the FY 98 budget of the YPS, the State must appropriate all amounts provided in FY 97 *plus* over $41 million in additional funds.

Wherefore, the defendant City of Yonkers seeks entry of an Order providing that the added State defendants are jointly liable with the City of Yonkers to provide the necessary funding to fully implement the 1986 School Desegregation Order and for such other relief as may be proper under the circumstances.

Appendix

Dated: May 15, 1997

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.

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